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Nos. 85-1239 and 85-1406

In the Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
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AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General

ANNE S. ALMY
JACQUES B. GELIN
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

RALPH W. TARR
Solicitor

L. POE LEGGETTE
Assistant Solicitor

Department of the Interior
Washington D.C. 20240

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erroneously ruled that a district court must, except in unusual circumstances, enter a preliminary injunction whenever it finds a likely violation of a procedural requirement of an environmental statute.

2. Whether Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, which requires federal land managers to determine whether proposed dispositions of public lands in Alaska "would significantly restrict subsistence uses" and, if so, to follow certain procedures and make certain findings prior to any such disposition, applies to the outer continental shelf (OCS), when the Act defines "public lands" as lands which are "in Alaska" and "the title to which is in the United States."

3. Whether, even if Section 810 applies to the OCS, neither OCS leasing nor exploration may proceed until the Secretary of the Interior complies with Section 810's procedural requirements for all stages of the OCS program, including development and production.

4. Whether a construction that ANILCA applies to the OCS should be given retroactive effect, thereby casting a cloud over more than 600 previously issued OCS leases and $4.2 billion in bonus bids received by the Treasury for those leases.

PARTIES TO THE PROCEEDING

The petitioners in No. 85-1406 are Donald P. Hodel, Secretary of the Interior, and the United States Department of the Interior. The petitioners in No. 85-1239 are Amoco Production Company, ARCO Alaska, Inc., Exxon Corporation, Mobil Exploration & Producing Services, Inc., Sohio Alaska Petroleum Company, Shell Western E & P, Inc., Texaco, Inc., Union Oil Company of California. The respondents are People of the Village of Gambell, People of the Village of Stebbins, and Nunam Kitlutsisti.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a)[1] is reported at 774 F.2d 1414. The opinion of the district court (Pet. App. 35a-43a) is unreported. An earlier opinion of the court of appeals in this case (*Gambell I*) (Pet. App. 44a-65a) is reported at 746 F.2d 572. An earlier opinion of the district court (Pet. App. 68a-69a) is unreported.

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[1] Pet. App. references are to the appendix to the petition in No. 85-1406.

JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on October 25, 1985. On January 13, 1986, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 22, 1986. The petition was filed on February 21, 1986, and was granted on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent provisions of the Alaska National Interest Lands Conservation Act (ANILCA) are reproduced at Pet. App. 116a-122a.

STATEMENT

This case concerns exploratory drilling by lessees of the federal government in two outer continental shelf (OCS) leasing areas in the Bering Sea: Norton Sound (Lease Sale 57) and the Navarin Basin (Lease Sale 83). In 1984, the court of appeals ruled that Section 810 of ANILCA, 16 U.S.C. 3120, applies to the OCS in Norton Sound, and remanded for further proceedings. The district court subsequently denied respondents' request for a preliminary injunction against exploratory operations in Norton Sound, which had been consolidated with a similar request involving such operations in the Navarin Basin. A divided panel of the court of appeals reversed the district court on the ground that respondents' showing of a likelihood of success on their claim that the Secretary of the Interior violated Section 810 required the issuance of an injunction, notwithstanding the countervailing equities and public interest considerations that led the district court to deny injunctive relief.

1. *Title VIII of ANILCA and OCS Leasing.* Congress enacted ANILCA, 16 U.S.C. 3101 *et seq.*, on December 2, 1980, to preserve for future generations "certain lands and waters in the State of Alaska that contain nationally

significant natural, scenic, historic, archaeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" (16 U.S.C. 3101(a)). To that end, ANILCA established "conservation system unit[s]" (16 U.S.C. 3102(4)). Additionally, ANILCA is intended to "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," as long as that opportunity is provided in a manner consistent with "the purposes for which each conservation system unit is established" (16 U.S.C. 3101(c)).

Title VIII of ANILCA, 16 U.S.C. 3111-3126, creates a framework for protecting "subsistence uses" [2] by rural Alaskans. Section 804, 16 U.S.C. 3114, provides that "subsistence uses shall be accorded priority over the taking on such [public] lands of fish and wildlife for other purposes." Section 805(a)(1) creates a mechanism for administering the preference, directing the Secretary of the Interior to create at least six "subsistence resource regions" which together encompass "all public land" (16 U.S.C. 3115(a)(1)). Within each region the Secretary is to establish an advisory council and, "as he finds necessary," other local advisory committees, in order to receive the expertise of local residents on subsistence issues (16 U.S.C. 3115(a)(2) and (3)). Section 805(d) directs the Secretary not to implement Section 805(a) through (c) if the State "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, Sections 803, 804, and 805" (16 U.S.C. 3115(d)). The Secretary has acknowledged that the

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[2] "Subsistence uses" mean "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade" (16 U.S.C. 3113).

State's laws meet the requirements of Section 805(d). See, generally, Alaska Stat. §§ 16.05.010-16.05.950 (1983 & Supp. 1984).

Section 810 provides that a federal agency must follow certain procedures "[i]n determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands" (16 U.S.C. 3120). The federal agency having "primary jurisdiction" over the relevant public land must first evaluate three factors: the effect of the action on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and alternatives which would "reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes" (*ibid.*). If the action "would significantly restrict subsistence uses," the federal agency must notify the appropriate state agency, as well as any appropriate regional councils and local committees (*ibid.*). The federal agency then must hold a hearing in the vicinity of the area involved, and make three findings (16 U.S.C. 3120(a)(3)):

> that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

2. *The challenge to Lease Sale 57 (Norton Sound).* Lease Sale 57, which took place in March 1983, was preceded by intensive study of possible environmental impacts, including impacts on subsistence uses. The environmental impact statement (EIS) for Lease Sale 57 gave considerable attention to possible impacts on subsistence uses (EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296) and concluded that significant disruption of subsistence uses from all phases of OCS operations

was "unlikely" (*id.* at 142).[3] However, the Department did not follow the specific procedures of Section 810 of ANILCA because it was of the view that ANILCA did not apply to the OCS.

Respondents, the native villages of Gambell and Stebbins, filed a complaint on March 4, 1983, seeking injunctive relief against Lease Sale 57. The complaint charged that the Secretary had failed to comply with Section 810 and that the sale conflicted with the villagers' alleged aboriginal rights to the OCS. The district court denied the villages' motion for a preliminary injunction, and the sale was held on March 15, 1983. On April 4, 1983, the district court denied the villages' motion for summary judgment. It ruled that the meaning of the phrase "public lands"—"'land situated *in Alaska*' to which the United States holds title" (Pet. App. 68a (emphasis in original))—is "clear." Rejecting "plaintiffs' attempts to manufacture an ambiguity," the court concluded that there is "no persuasive evidence that Congress intended the phrase 'public lands', as used in § 810(a), should include offshore lands and waters outside the territorial boundaries of Alaska" (*id.* at 69a). The court also held that the villagers have no aboriginal rights to the OCS (*ibid.*; see *Inupiat Community of the Arctic Slope* v. *United States*, 548 F. Supp. 182, 186 (D. Alaska 1982), aff'd on other grounds, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985)). Based on these rulings, the district court granted summary judgment in favor of the government and the intervenor oil companies (*ibid.*). The villages appealed and moved in the Ninth Circuit to enjoin the issuance of leases pending appeal. That motion was denied by a panel of the court of appeals on May 10, 1983. On that same day, 59 tracts were leased for bonus payments totaling $317,873,372 (Minerals Management Service, *Federal Offshore Statistics* 13 (1984)).

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[3] The final EIS for Lease Sale 57 is part of the record in this case, but has not been reproduced in the joint appendix due to its length. A copy of the EIS has been lodged with the Clerk.

3. *Approval of exploration plans for Norton Sound.* Subsequent to the district court's ruling, but prior to the court of appeals' decision on the merits of the appeal, intervenors Exxon and ARCO (among the petitioners in No. 85-1239) submitted exploration plans covering a number of the tracts in Norton Sound on which they had received leases. Exploration is the third of the "four distinct statutory stages to developing an offshore oil well" created by the 1978 amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. 1331 *et seq.* *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).[4] Exploration may proceed only after the lessees demonstrate compliance with any applicable state management program under the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* The Secretary approved Exxon's exploration plan on December 28, 1983, and ARCO's plan on March 19, 1984. Neither respondents nor anyone else challenged the Secretary's approval of the exploration plans within the 60-day period provided by 43 U.S.C. 1349(c). Accordingly, exploration proceeded in Norton Sound during the summer of 1984 with the drilling of several wells (see, *e.g.*, J.A. 26).

4. *The court of appeals' decision in Gambell I.* On appeal, the court of appeals reversed the district court's ruling on Section 810 and affirmed its ruling on the aboriginal claims on other grounds (*Gambell I*, Pet. App. 44a-65a). The court first addressed the aboriginal claim by "assum[ing] rather than deciding that appellants had an aboriginal right to hunt and fish in the waters of Norton Sound above the lands involved in the lease-sale" (*id.* at 45a n.1). The court concluded that these rights had been extinguished by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1603(b) (Pet. App. 46a-57a).

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[4] The four stages of the OCS process are: (1) planning a five-year nationwide leasing program (43 U.S.C. 1344); (2) conducting a lease sale (43 U.S.C. 1337(a)); (3) exploration (43 U.S.C. 1340); and (4) development and production (43 U.S.C. 1351).

The court next turned to Section 810, reviewing first the legislative history of ANILCA to determine whether the phrase "public lands" was intended to apply to the OCS. Relying on several instances where legislators appeared to refer to the OCS as being "in Alaska" (Pet. App. 58a) and noting that ANCSA and Title VIII of ANILCA "are clearly related," the court found it a "reasonable assumption that Congress intended the preference and procedural protections for subsistence uses mandated by Title VIII of [ANILCA] to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary" (*id.* at 59a). The court also found "compelling" that Title VIII of ANILCA "was adopted to benefit the Natives" and on that basis chose to resolve any "ambiguit[y]" in the statute in their favor (*id.* at 62a-63a). Accordingly, the court ruled that the phrase "public lands" included "outer continental shelf lands and waters contiguous to the State of Alaska" (*id.* at 58a).

The court of appeals did not reach the question whether Interior had substantially complied with Section 810 in the course of complying with other environmental statutes or, if not, whether the Sale 57 leases should be voided. Instead, the court remanded the case to the district court for a determination of those issues and the framing of an appropriate remedy (Pet. App. 65a).

5. *Interior's post-Gambell I subsistence evaluation for Lease Sale 57.* In accordance with the court of appeals' decision in *Gambell I*, Interior began to integrate the requirements of Section 810 into its Alaska OCS leasing program. With respect to Lease Sale 57, Interior determined to reevaluate subsistence issues, including those already studied in the EIS for the sale. Interior's post-sale Section 810 evaluation was issued on April 22, 1985 (Pet. App. 81a-106a). The evaluation document followed the stage-by-stage approach set out in the OCSLA (see note 4, *supra*) (id. at 84a). The evaluation document nonetheless analyzed, to the extent feasible, possible im-

pacts that might arise at those future stages of the OCS process (*ibid.*).

The evaluation document found that the execution of leases (which permits lessees to conduct only limited preliminary activities on the OCS) had not and would not significantly restrict subsistence uses (Pet. App. 103a). The evaluation document further found that the exploration stage activities that had occurred in Norton Sound to date had not significantly restricted subsistence uses and were not likely to do so in the future (*id.* at 103a, 106a). The evaluation document noted that a separate Section 810 evaluation would be performed for each subsequent exploration plan submitted for the Secretary's approval (Pet. App. 85a). Finally, the evaluation document found that, if development and production activities were ever conducted in the Lease Sales 57 area, which was not likely, they might, in the event of a major oil spill, significantly restrict subsistence uses for limited periods in limited areas (*id.* at 92a-99a).[5] The evaluation document stressed that more definitive judgments could be made only if and when a particular development and production plan were submitted for approval and that a separate Section 810 evaluation would be prepared at that time (Pet. App. 85a).

6. *Lease Sale 83 (Navarin Basin).* Lease Sale 83 was conducted on April 17, 1984, without litigation challenge, and resulted in the leasing of 163 tracts for total bonus payments of $516,317,331 (Minerals Management Service, *Federal Offshore Statistics* 15 (1982)). The Basin is so far from land—more than 250 miles from the nearest inhabited land (St. Lawrence Island) and more than 350 miles from the mainland—that no Native subsistence harvesting occurs there. Nevertheless, the possible subsistence effects of Lease Sale 83 were examined in the lease sale EIS (EIS III-60 to III-75, IV-20 to IV-68,

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[5] To this extent, the findings differed from those of the EIS discussed on pages 4-5, *supra*.

IV-81 to IV-90, IV-106, IV-112) and found to be negligible (*id.* at IV-83 to IV-84).[6]

Interior approved exploration plans for the Navarin Basin on December 28, 1984 (Exxon), January 23, 1985 (ARCO), and April 19, 1985 (Amoco). These approvals were made after the court of appeals' ruling in *Gambell I* and accordingly contained explicit Section 810 evaluations. See, *e.g.*, Pet. App. 107a-115a (Section 810 evaluation for Exxon's exploration plan). No challenges to these approvals were brought within the 60-day period provided in 43 U.S.C. 1349(c)(3)(C). In reliance on the approvals, the three companies proceeded to commit more than $60 million in preparation for the 1985 drilling season (J.A. 35-52).

7. *Proceedings on remand in the district court.* On April 3, 1985, the villages returned to the district court seeking a preliminary injunction against exploratory activities in the Lease Sale 57 area. By that time, intervenor Exxon had committed more than $10 million toward the drilling of two exploratory wells in Norton Sound during the ice-free months of 1985 (J.A. 30-34).

On April 23, 1985, more than a year after Lease Sale 83 had been held, respondent Village of Gambell, joined by respondent Nunam Kitlutsisti, an organization of Yukon Delta Natives, filed a complaint seeking to void Lease Sale 83 and enjoin imminent exploratory drilling in the Navarin Basin. The Lease Sale 83 complaint, like that in the Lease Sale 57 litigation, alleged violations of Section 810 and also added a claim that the Secretary, by conducting the lease sale, had breached trust duties owed to the Natives.

After consolidating the requests for preliminary injunctions in the Lease Sale 57 and Lease Sale 83 cases, the district court denied the motions on May 23, 1985 (Pet. App. 35a-43a). The court found that respondents

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[6] A copy of the Lease Sale 83 final EIS has been lodged with the Clerk (see note 3, *supra*).

had "established a strong likelihood of success on the merits" (*id.* at 43a). Specifically, the court reasoned that even though the Secretary's environmental impact statements for both lease sales had included the type of evaluation of subsistence impacts called for by Section 810, those evaluations were necessarily deficient because the Secretary "did not have the policy precepts of ANILCA in mind at the time of evaluation" (Pet. App. 37a-38a). The court went on to examine Interior's post-sale ANILCA compliance document for Lease Sale 57 (see pages 7-8, *supra*). The court did not question that this document adequately evaluated the effects of leasing on subsistence uses, nor did it question Interior's conclusion that neither the leasing nor the exploration stage of the OCS process would significantly restrict subsistence uses. However, the court concluded that the notice, hearing, and findings requirements of Section 810(a)(1)-(3) should have been followed, in light of Interior's determination that a significant restriction on subsistence uses might occur at the development and production stage, should that stage ever be reached (Pet. App. 40a-41a).

The district court nevertheless concluded that the equities weighed against the issuance of an injunction prohibiting continued exploratory activities. First, the OCSLA gives the Secretary continuing power to control and shape the offshore leasing process; hence, if compliance with the requirements of Section 810 reveals a need to alter leasing conditions or configurations, the Secretary retains the power to do so (Pet. App. 43a). Second, it was apparent that the only activity planned at this time, exploration, would not significantly restrict subsistence uses (*ibid.*). Third, the national interest in expedited OCS exploration declared in 43 U.S.C. 1332(3) might be frustrated by an injunction (Pet. App. 43a).

8. *The court of appeals' decision in Gambell II.* Respondents appealed from the district court's denial of injunctive relief and sought an emergency injunction against the ongoing exploratory drilling in the two lease

sale areas. On June 6, 1985, a panel of the court of appeals denied the motion, but directed the Secretary, in conjunction with the intervenor oil companies, to file a "hold harmless agreement that will protect [the villages] from any consequences resulting from significant restrictions upon subsistence uses by [the villages] of their lands" (Pet. App. 70a). A hold harmless agreement was submitted to the court of appeals on June 13, 1985 (*id.* at 72a-76a) and approved by the court, with minor revisions, on June 21, 1985 (*id.* at 77a-78a).

Exploratory drilling proceeded without incident in both lease sale areas throughout the summer and fall of 1985. On October 25, 1985, a divided panel of the court of appeals reversed the district court's denial of preliminary injunctive relief (*Gambell II*, Pet. App. 1a-34a). The court of appeals affirmed the district court's ruling that the villages had established a strong likelihood of success on the merits, agreeing with the lower court that the Secretary could not have substantially complied with Section 810 of ANILCA because he did not have its mandate "clearly in mind" when he decided to conduct the lease sales (Pet. App. 8a-12a).[7] Turning to the post-sale Section 810 evaluation for Lease Sale 57 (see pages 7-8, *supra*), the court of appeals agreed with the district court that Interior's finding that development and production activities, if they ever occur, "may significantly restrict subsistence uses in certain areas" (Pet. App. 85a) required the Secretary to conduct the hearing and make the findings required by Section 810(a)(1)-(3) prior to conducting the lease sales. The court dis-

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[7] Inexplicably, the court of appeals stated (Pet. App. 9a) that "in determining whether to approve Lease Sale 57 or Lease Sale 83, the Secretary did not evaluate the effect of such leases on subsistence uses and needs of the Native Alaskans," even though the district court had found the opposite, relying on a record that clearly showed that the Secretary had performed detailed subsistence evaluations in the environmental impact statements prepared for the two sales (*id.* at 37a, 41a-42a).

tinguished *Secretary of the Interior* v. *California*, on the ground that the decision did not deal with ANILCA (Pet. App. 13a).

The court of appeals next held that the equitable considerations relied upon by the district court in denying a preliminary injunction did not "excuse its duty to issue an injunction in light of its determination that there was a strong likelihood that the Villages would prevail [on the merits]" (Pet. App. 15a). The court of appeals did not disagree with the district court's finding that "exploration will not significantly restrict subsistence resources" (*ibid.*). Instead, the court ruled that "'[i]rreparable damage is presumed'" whenever an agency has failed to comply with "a substantive procedural [requirement] of an environmental statute" (*ibid.*, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)) and, accordingly, an injunction is required except in "unusual circumstances" (Pet. App. 15a, 19a). The court of appeals limited "unusual circumstances" to where enjoining a project from proceeding in likely violation of an environmental statute would cause more environmental harm than good (*id.* at 17a) or would interfere with certain types of long-term contracts (*id.* at 16a, 19a). In this case, the court of appeals held that the district court erred in finding "unusual circumstances" based on either the harm an injunction would cause to the national interest in expedited OCS development or the ability of the Secretary to alter the configuration of OCS activities if ANILCA subsistence studies show that to be necessary at any future stage of exploration or development (*id.* at 16a, 19a, 20a).

The court of appeals rejected the district court's findings with respect to the public interest, which were bottomed on the policy declared by Congress in the OCSLA to expedite exploration of the OCS. The court concluded that ANILCA effectively superseded this congressional policy (Pet. App. 20a-21a). Finally, the court rejected arguments that it was improper to apply *Gambell I* retro-

actively to Lease Sale 83 (*id.* at 22a-25a) and that the respondents' challenge to Lease Sale 83 was barred by laches (*id.* at 25a-26a).

District Judge Dimmick, sitting by designation, dissented (Pet. App. 28a-34a). Judge Dimmick noted that the government and the oil company intervenors "presented the trial court with substantial evidence showing that it was highly unlikely that exploratory activities would adversely affect subsistence resources," as well as evidence that the oil companies would have lost up to $70 million if the preliminary injunction had been granted (*id.* at 30a). In contrast, the villages had presented only evidence of "speculative harm" (*ibid.*). The dissent asserted (*id.* at 29a) that the majority's "rigid approach to the issuance of an injunction" was contrary to *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The dissent also disagreed (Pet. App. 31a-32a) with the majority's retroactive application of *Gambell I* to Lease Sale 83.

SUMMARY OF ARGUMENT

I

Under traditional principles of equity, a mere showing that a statute has been or likely has been violated is not sufficient to require the extraordinary remedy of injunctive relief. The court must also determine whether injunctive relief is necessary to avoid irreparable injury to the party seeking that relief and consider the harm to others, as well as the public consequences, that such relief would entail. Applying these principles in this case, the district court properly denied respondents' request for a preliminary injunction on the ground that both the balance of irreparable harm and the public interest counseled against injunctive relief.

The court of appeals reversed on the erroneous ground that federal district courts lack their traditional equitable discretion in the enforcement of the procedural require-

ments of environmental statutes, such as Section 810 of ANILCA. Specifically, the court held that district courts must, except in unusual circumstances, presume both that "irreparable harm" has resulted from a likely violation of an environmental procedural requirement and that the "public interest" elevates environmental values over other competing public concerns. Because neither of these limitations on the district courts' equity jurisdiction is rooted in clearly expressed congressional intent, their imposition is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). Nowhere in ANILCA did Congress suggest that injunctive relief is invariably required to preserve the efficacy and policy objectives of the Section 810 procedures. Nor did Congress anywhere suggest that those policy objectives supersede all other public interest concerns relevant to an award of injunctive relief in a particular case.

The circumstances of this case underscore the inappropriateness of applying such unsupported generalizations. Injunctive relief is plainly not necessary in this case to preserve the meaningfulness of Section 810 procedures or to redress any irreparable injury to respondents' interests. If it is ultimately resolved that Interior violated Section 810, compliance may be achieved before the development and production stage, which is the only stage that poses even a potential threat of a significant restriction on subsistence uses. Accordingly, because no significant restrictions were threatened absent an injunction, no public interest concerns favored the issuance of such relief. Concomitantly, the court of appeals' refusal to consider the weighty public interest considerations counselling against injunctive relief—particularly the express congressional goal of expedited exploration and development of the OCS—was without legal basis.

II

At all events, the relief in this case was predicated solely on the likelihood of a violation of a statutory requirement that is entirely inapplicable to the actions at

issue. Section 810 of ANILCA, 16 U.S.C. 3120, does not require a federal agency to evaluate the effects of every category of federal actions that might adversely affect subsistence resources. Section 810 concerns only effects on subsistence uses caused by proposed dispositions of "public lands," which ANILCA defines as lands that are both "situated in Alaska" and "the title to which is in the United States" (16 U.S.C. 3102(2) and (3)). The OCS meets neither statutory criterion. The OCS is, by definition, outside the boundaries of Alaska, and Congress has carefully and repeatedly declined to equate the federal government's interest in the OCS with the concept of title. Hence, dispositions of the OCS necessarily fall outside the scope of Section 810 even if they might affect subsistence resources.

Respondents' contrary view ignores the plain meaning of the statutory definition of "public lands" and mistakenly relies on isolated, casual remarks in the legislative debates and canons of statutory construction relevant only to the judicial construction of ambiguous statutory terms. In all events, ANILCA's legislative history and background and its statutory structure confirm that Congress did not intend to depart from traditional practice by including the OCS within "public lands." The clear consensus of the legislators, reflected throughout the Act's legislative history, was that its requirements would not extend beyond the state's boundaries and therefore would have no effect on oil and gas development on the OCS.

III

Even if Section 810 of ANILCA were thought to apply to the OCS, the court of appeals erred in rejecting the Secretary's post-sale compliance effort for Sale 57. In its Section 810 evaluation, Interior found that the lease sale stage of the OCS leasing process would not lead to significant subsistence restrictions; accordingly, the additional notice, hearing, and findings requirements of Section 810

were not followed. The Section 810 evaluation noted as well that if the development and production stage were reached, which was unlikely, a significant subsistence restriction might occur in certain localities. The court of appeals ruled that the mere threat of a significant restriction at the development and production stage triggered the notice, hearing, and findings requirement of Section 810(a)(1)-(3), 16 U.S.C. 3120(a)(1)-(3), at the leasing stage. This construction of Section 810 conflicts with its plain language and is inconsistent with this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

In *Secretary of the Interior* v. *California*, this Court concluded that because the OCS leasing process consists of distinct stages, with each stage involving separate regulatory review and an additional transfer of rights to conduct activities on the OCS, the lease sale stage could not be deemed to have a "direct effect" on the coastal zone based on impacts potentially arising only at later stages. By its plain terms, Section 810 applies to each distinct stage separately; hence, as in *Secretary of the Interior* v. *California*, a lease sale should not be deemed to restrict significant subsistence resources based on restrictions potentially occurring (if at all) only at the development and production stage. To be sure, in performing a Section 810 evaluation for one stage, the agency may look to possible future stages, but for the purposes of determining whether the additional procedural requirements of Section 810 are triggered, the only relevant inquiry is whether the particular disposition of lands at issue—in this case the lease sale—"would significantly restrict subsistence uses" (16 U.S.C. 3120). In any event, because the Secretary found in this case that the development and production stage is not likely to occur at all, it is clear that the statutory standard that the proposed disposition "would significantly restrict subsistence uses" has not been met.

IV

Finally, even if this Court should agree with the court of appeals in *Gambell I* that Section 810 of ANILCA applies to the OCS, that construction should not, under this Court's criteria in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), be applied retroactively to either Lease Sale 57 or Lease Sale 83. First, *Gambell I* declared a new principle of law, which differed from prior agency construction and the district court's construction. Second, retroactive application of *Gambell I* would further no policy objective of Section 810 because Interior consistently carried out substantial pre-leasing analyses of subsistence pursuant to NEPA. The Department of the Interior has announced, moreover, that it will not (if *Gambell I* is upheld) approve exploration or production plans without additional Section 810 reviews. Finally, the equities weigh strongly against retroactive application. Balanced against respondents' desire for a reevaluation of matters already thoroughly studied are the strong public interest in avoiding unnecessary disruptions to OCS development, as well as the enormous investments made by the oil companies pursuant to the lease sales.

ARGUMENT

I. THE NINTH CIRCUIT RULE THAT SECTION 810 OF ANILCA AND COMPARABLE ENVIRONMENTAL PROCEDURAL REQUIREMENTS DENY FEDERAL DISTRICT COURTS TRADITIONAL EQUITABLE DISCRETION WITH RESPECT TO THE ISSUANCE OF INJUNCTIVE RELIEF IS CONTRARY TO THIS COURT'S DECISION IN *WEINBERGER* V. *ROMERO-BARCELO*, 456 U.S. 305 (1982)

The court of appeals' ruling that the district court abused its discretion in denying respondents' motion for a preliminary injunction is inconsistent with this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). The district court denied that motion on the

grounds that "[t]he balance of irreparable harm does *not* favor the [respondents]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). The court stressed that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence," contrary to explicit congressional policy (see 43 U.S.C. 1332(3)), and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). In reversing, the court of appeals disputed the district court's characterization of the "public interest" (*id.* at 19a-21a), but did not disturb its finding that an injunction was not necessary to prevent irreparable harm to respondents' interests.[8] Instead, the appellate court purported to distinguish *Romero-Barcelo*, in which this Court stressed that "the basis for injunctive relief in the federal courts has always [included] irreparable injury" and upheld a district court's refusal to follow a different

[8] In an attempt to deny the court of appeals' express rationale, respondents (Br. in Opp. 26) and the State of California as amicus curiae (Br. 4) seize upon the court's isolated statement that "[t]he by-products of oil and gas exploration such as potential oil spills, leakage, and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the Native Alaskans" (Pet. App. 21a (citing R. Little & L. Robbins, *Technical Report No. 89, Effects of Renewable Resource Harvest Disruptions on Socioeconomic and Sociocultural Systems: St. Lawrence Island* 330-374 (1984))). The court of appeals, however, clearly did not base its ruling on any such unsupported factual finding. The Department of the Interior in this case made explicit findings, never challenged by respondents, that exploration would not significantly restrict subsistence resources in the two lease sale areas. Indeed, as the court of appeals recognized (Pet. App. 15a), the district court found that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from exploration stage activities (Pet. App. 43a). The court of appeals did not overturn this finding as clearly erroneous (the record certainly would not have supported such action), but instead ruled that lack of harm did not qualify as an "unusual circumstance" excusing the mandatory issuance of an injunction (*id.* at 15a).

approach for violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.* (456 U.S. at 312, 314-320). See Pet. App. 21a-23a n.2. In our view, *Romero-Barcelo* is controlling and, as in that case, the district court's denial of injunctive relief was proper.

1. In *Romero-Barcelo*, this Court thoroughly reviewed basic principles of equity jurisprudence in the federal courts and addressed, in particular, the application of those principles to violations of federal statutes, including federal environmental protection laws. Starting with the proposition that an injunction " 'is not a remedy which issues as of course' " (456 U.S. at 311 (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)), the Court stated that the foundation for "injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies" (456 U.S. at 312). Moreover, consideration of the equities is essential: "Where plaintiff and defendant present competing claims of injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims" (*ibid.* (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). " 'The essence of equity jurisdiction,' " the Court stated, is " 'to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it' " (456 U.S. at 312). Finally, the Court admonished that "courts of equity should pay particular regard for the public consequences in employi ç the extraordinary remedy of injunction" (*ibid.*).

These principles apply with special force to the issuance of preliminary injunctions. In the preliminary injunction context, the court will often not have had an opportunity to consider fully the merits of the case,[9] thereby making the sole justification for the exercise of equitable power the maintenance of the status quo pending completion of

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[9] While this may have been true of the district court in the present case, the court of appeals appears to have fully addressed the merits (see note 14, *infra*).

the litigation. Cf. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 9-11 (1942). Accordingly, the plaintiff must demonstrate that, in the absence of a preliminary injunction, it will suffer actual and substantial injury that is truly irreparable, *i.e.*, incapable of remedy by relief ordered at the termination of the litigation. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). Moreover, the court must consider the injury to the defendant and the public interest that would be occasioned by the entry of even a temporary injunction. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In an appropriate case, irreparable damage to the public interest will justify withholding preliminary relief even though the burden on the plaintiff is substantial. *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944).[10]

In this case (and in those prior decisions upon which the court of appeals relied), the Ninth Circuit rejected these well established principles and applied a rule that, in effect, requires a district court to enter the injunction requested by the plaintiffs whenever it finds a violation, or probable violation, of a "substantive procedural" [11] requirement of an environmental statute (Pet. App. 14a-

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[10] Taken together, these considerations constitute the familiar four-part test that traditionally has governed the issuance of preliminary injunctions, stays, and other forms of temporary equitable relief in the federal courts. See, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). In *Virginia Petroleum Jobbers*, 259 F.2d at 925, the court articulated the test as follows: (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party has shown that without such relief, it will be irreparably injured; (3) whether the issuance of a stay would substantially harm other parties; and (4) whether injunctive relief would be in the public interest.

[11] Although the court below stated that "[a]n injunction is the appropriate remedy for a substantive procedural violation of an environmental statute" (citing *Thomas* v. *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985)), the court's opinion in *Thomas* actually referred to "a *substantial* procedural violation" (*ibid.* (emphasis added)). Whether the discrepancy was deliberate or unintended does not

19a).[12] That rigid approach to injunctive relief in environmental suits cannot be reconciled with *Romero-Barcelo*. For, without basis in expressed congressional intent, it sharply curtails, if not eliminates altogether, the traditional authority of federal courts to consider the equities of awarding injunctive relief in a particular case.

This Court made plain in *Romero-Barcelo* that while "Congress may intervene and guide or control the exercise of the courts' [equitable] discretion, * * * we do not lightly assume that Congress has intended to depart from established principles" (456 U.S. at 313 (citations omitted)). "'[C]omprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid.* (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also 456 U.S. at 322 (Stevens, J., dissenting)) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion."). The "purpose and language of the statute under consideration * * *, not the bare fact of a statutory violation," determine whether Congress took the extraordinary step of curtailing the courts' discretion in the exercise of their equitable jurisdiction (456 U.S. at 314).

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affect our submission that the court of appeals' analysis is inconsistent with *Romero-Barcelo*.

[12] As noted (see page 12, *supra*), the Ninth Circuit's rule admits of only two exceptions. Injunctive relief may be denied if such relief would itself cause irreparable harm to the environment or if such relief would interfere with certain types of long-term contracts (Pet. App. 16a, 19a). The contractual-interference exception is evidently quite narrow, because the court of appeals did not apply it in this case despite the fact that injunctive relief against exploratory operations interferes with the intervenor oil companies' right to explore pursuant to their contracts with the government and their approved exploration plans.

Hence, in *TVA* v. *Hill*, 437 U.S. 153 (1978), this Court held that a permanent injunction was required precisely because the statutory provision that was violated (Endangered Species Act, 16 U.S.C. 1536) amounted to a "flat ban" for which "only an injunction could vindicate [its] objects" (*Romero-Barcelo*, 456 U.S. at 314). By contrast, in *Romero-Barcelo* the Court held that in the Clean Water Act, 33 U.S.C. 1251 *et seq.*, Congress has not evinced in the language, structure of the Act, or its legislative history sufficient intent to "deny courts their traditional equitable discretion" (456 U.S. at 319). While the Clean Water Act plainly prohibits discharges into navigable waters absent a federal permit (see 33 U.S.C. 1311) and the Navy in that case had no permit, the Court concluded that accomplishment of the Act's objectives did not require the issuance of an injunction.

2. Here, as in *Romero-Barcelo*, there is no clear indication that Congress intended to deny federal district courts their traditional equitable discretion in enforcing Section 810 of ANILCA. Section 810's requirement that certain steps be taken prior to a proposed disposition of public lands that would significantly restrict subsistence uses does not address the distinct issue whether a district court must award certain relief when a violation or a likely violation of that requirement has been established. Indeed, the inherently procedural nature of Section 810 strongly suggests that Congress did not intend to deny the courts their traditional equitable discretion. By its very nature, a procedural requirement is ancillary to the substantive policy objectives of the statute and, hence, whether its violation requires the extraordinary remedy of injunctive relief should normally turn on the particular circumstances of the case. See *Romero-Barcelo*, 456 U.S. at 314 ("Respondents suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the [Clean Water

Act]."). Similarly, here Congress stressed both that Section 810's requirements are "procedural" and that, once those requirements are satisfied, "the proposed action may proceed even though its effect may be adverse to subsistence uses" (S. Rep. 96-413, 96th Cong., 1st Sess. 234 (1979)).

The court of appeals' contrary analysis rests on two premises. The first is that "'[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action'" (Pet. App. 15a, quoting *Save Our Ecosystems* v. *Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984)). The second is that the "public interest" favors injunctive relief because the interests served by federal environmental procedural requirements, such as ANILCA, supersede all other interests that might be at stake in a particular case (see Pet. App. 19a-21a, 23a n.2; see also *Save Our Ecosystems*, 747 F.2d at 1250). The fundamental flaw in these premises is that neither is based on clear expression of congressional intent.[13] Their inappropriateness in the circumstances of this case, moreover, both exposes the dangers of such unsupported generalizations and underscores the importance of traditional case-by-case review.

a. First, while we fully agree that the possibility of irreparable harm must be a central focus of the judicial inquiry in environmental cases, there is no basis for presuming that such harm will invariably occur unless injunctive relief is provided to remedy a violation of an environmental statutory requirement, such as Section 810 of ANILCA. Where, as here, the moving party has made no showing of irreparable harm and the purpose of the requirement purportedly violated is largely to assess the environmental impact of the proposed governmental

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[13] While the Senate Report states that "until the requirements of * * * section [810] have been satisfied the proposed action may not proceed" (S. Rep. 96-413, *supra*, at 234), the statement is part of a single sentence that goes on to explain that a "proposed action may proceed even though its effect may be adverse to subsistence uses" (*ibid.*).

action (rather than flatly to prohibit it), the propriety of injunctive relief should turn on traditional considerations, including whether such relief is necessary to render compliance with the requirement meaningful. As other courts of appeals have properly recognized, an injunction to redress a violation of an environmental statute, particularly an environmental procedural requirement, is not always necessary to preserve the decisionmaker's opportunity to implement the statute in the manner intended by Congress. See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485 (D.C. Cir.) (injunction against an ongoing project available only where necessary "to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by [the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*]"), vacated in part on other grounds as moot *sub nom. Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978); see also *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983); *Sierra Club* v. *Hennessy*, 695 F.2d 643, 648-649 (2d Cir. 1982).

Here, there is no reason to believe that additional exploratory drilling by the oil companies would have made future compliance with Section 810 meaningless either in fulfilling its procedural requirements or in accomplishing its policy objectives. If it is ultimately resolved that Interior violated Section 810, compliance may be effected before the production stage—the only stage that poses even a potential threat of a significant restriction on subsistence uses (see page 8, *supra*). Interior made explicit findings that exploration would not significantly restrict subsistence resources in the two lease sale areas (see Pet. App. 85a, 90a, 92a, 95a, 98a, 99a, 101a, 103a, 106a, 108a-115a), and those findings have neither been challenged by respondents nor questioned by the court below. Indeed, the district court explicitly found (*id.* at 43a) that the injury Section 810 was intended to prevent—significant restrictions on subsistence uses—was highly unlikely to result from explo-

ration activities, and that Interior possesses adequate continuing authority over the OCS development process to cure any statutory violation. An order directing Interior to comply with Section 810 would, therefore, be at least as effective as the order issued by the district court in *Romero-Barcelo*, which directed the Navy to apply for a discharge permit under the Clean Water Act (see 456 U.S. at 309-310).[14] As in *Romero-Barcelo*, injunctive relief is not automatically necessary. The court of appeals, however, gave no deference to the district court's findings, and undertook no particularized analysis regarding whether irreparable harm would result to the interests protected by the statute—the finding of probable statutory violations started and ended its inquiry.[15]

b. Similarly, the court of appeals' assumption that the "public interest" automatically favors an injunctive remedy for violations of environmental procedural

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[14] The court of appeals' attempt (Pet. App. 23a n.2) to distinguish *Romero-Barcelo* on the ground that it involved a permanent rather than a preliminary injunction is wholly unpersuasive. A district court should have greater, not less discretion in considering whether preliminary relief is appropriate. In all events, the distinction is unavailing here because the court of appeals addressed the merits of this case as if it were considering a permanent injunction; the court made definitive rulings (Pet. App. 9a-14a, 22a-26a) which it has subsequently treated as binding precedent. See *Tribal Village of Akutan* v. *Hodel*, 792 F.2d 1376 (9th Cir. 1986) (*reprinted in* U.S. Reply Memo App.).

[15] The asserted violations in this case were, moreover, plainly insubstantial. In the Sale 83 case, for example, the district court found that the Secretary had "considered the relevant factors" required by Section 810 and had not erred in finding that the lease sale and subsequent stages of the OCS process, including development and production, would have "negligible" or "nonexistent" impacts on subsistence uses (Pet. App. 41a-42a). Nevertheless, the diestrict court and the court of appeals found a violation of Section 810 solely because the Secretary made his subsistence findings pursuant to NEPA, rather than Section 810, and thus did not have the policy precepts of Section 810 "clearly in mind" (Pet. App. 8a, 38a).

statutes lacks the necessary supporting indicia of congressional intent and is rebutted by the circumstances of this case. Contrary to the reasoning of the court of appeals, ANILCA plainly does not evince an unambiguous congressional intent to "cho[ose] the protection of subsistence life over oil exploration" (Pet. App. 23a n.2). To be sure, Title VIII of ANILCA, including Section 810, was intended "to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so" (16 U.S.C. 3101(c)). But the Act nowhere suggests that goal is to be achieved without compromise and no matter what the costs—indeed, as previously described (page 23, *supra*), quite the opposite is true (see S. Rep. 96-413, *supra*, at 234).[16]

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[16] The court of appeals' even broader presumption that Congress intended to elevate all environmental concerns over other competing national concerns is similarly flawed. This Court has rejected the notion that Congress intended generally to elevate environmental interests above other interests affected by a requested injunction. *Romero-Barcelo*, 456 U.S. at 316-319; see also *Aberdeen & Rockfish R. R.* v. *SCRAP*, 409 U.S. 1207, 1217-1218 (1972) (Burger, C.J., Circuit Justice) (recent environmental legislation, "however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. * * * The decisional process for judges is one of balancing and it is often a most difficult task."); cf. *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 228 n.2 (1980) (NEPA does not require agency "to elevate environmental concerns over other, admittedly legitimate, considerations"). The Court in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 (1976), for instance, stated that an injunction against coal mining ordered by the court of appeals in that case would have been erroneous even if that court's finding of a NEPA violation were correct because "in simple equitable terms there were no grounds for the injunction * * *" (427 U.S. at 407-408). In *Kleppe*, the district court had found that an injunction would have caused irreparable harm to the companies who sought to carry out their business ventures, and to the public who depended upon their operations, and the court of appeals had neither challenged that finding nor identified any imminent harm to the interests protected by NEPA (*ibid.*).

Because the court of appeals erroneously assumed that the "public interest" favored an injunction, that court failed to consider either Interior's and the district court's findings that significant subsistence restrictions were not at stake (see pages 8, 9, 10, *supra*) or the weighty countervailing public interest considerations counseling against injunctive relief in this case. Most fundamentally, as the district court found (Pet. App. 43a), enjoining exploratory activities threatens to cause irreparable harm to the congressionally mandated goal of expedited exploration and development of the OCS (see 43 U.S.C. 1802(1), 1802(9)). And, as the dissent below recognized (Pet. App. 30a), if the district court had enjoined exploratory activities at the outset of the 1985 season, as respondents had requested, such relief would have caused huge unrecoverable monetary losses to the intervenor oil companies, whose expenditures were made in reliance upon the Secretary's unchallenged approvals of their exploration plans. In sum, the application in this case of the court of appeals' preclusion of traditional equitable discretion has led to the entry of injunctive relief serving no substantial purpose other than to threaten irreparable harm to the public interest in expedited exploration and development of the OCS.

II. SECTION 810 OF ANILCA DOES NOT APPLY TO DISPOSITION OF AREAS OF THE OCS BECAUSE THEY ARE NOT "PUBLIC LANDS" WITHIN THE MEANING OF ANILCA

At all events, the relief in this case was predicated solely on the likelihood of violation of an environmental statutory requirement that is entirely inapplicable to the actions at issue. Section 810 of ANILCA requires a federal agency to evaluate the effect of its proposed disposition of "public lands" in Alaska on subsistence uses and needs (16 U.S.C. 3120). Its terms do not apply to any other federal actions that may affect subsistence uses and needs in Alaska. The only actions of the Secretary of the

Interior at issue in this case exclusively concern the OCS—which is *not* an area of "public lands" within the meaning of ANILCA. Respondents' contrary view, adopted by the court of appeals, ignores the plain meaning of the term "public lands," as expressly defined in ANILCA. Respondents' reliance on isolated, casual remarks in the legislative history and canons of statutory construction for ambiguous statutory terms, therefore, is misplaced; in all events, both the legislative history and the statutory structure of ANILCA confirm the view that the OCS lies outside Section 810's scope.

1. "[D]eference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985) slip op. 10 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)). In ANILCA, Congress carefully crafted a definition of "public lands" that leaves no room for an inference that Congress intended to include the OCS.[17] For the purposes of

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[17] Moreover, in traditional usage "public lands" refers only to onshore holdings of the federal government and does not include the OCS. See, *e.g.*, *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (tidelands are not "public lands"); Public Land Law Review Commission, *One Third of the Nation's Land* 30 (1970) ("the mineral resources in the Outer Continental Shelf" do "not constitut[e] public land interests in the usual legal or lay definitions of public lands"); S. Rep. 1444, 88th Cong., 2d Sess. 10 (1964) (letter from Acting Secretary of the Interior, John A. Carver, Jr.) ("lands of the [OCS] are not public lands"); H.R. Rep. 1008, 88th Cong., 1st Sess. 14 (1963) (same); see also U.S. Dep't of Interior, *Public Land Statistics* 113 (1985) (excluding "lands located on the [OCS]" from definition of "public lands"). Hence, when Congress intends to include the OCS within the term "public lands" in a particular statutory context, Congress typically makes that intent explicit. See, *e.g.*, 43 U.S.C. 155 (defining "public lands" for purposes of withdrawal, reservation, or restriction for defense purposes as including the OCS); Pub. L. No. 88-606,

ANILCA, "public lands" is defined (with certain exceptions not relevant here) as "land[s] situated in Alaska which, after [the date of enactment of this Act], are Federal lands" (16 U.S.C. 3102(3)). "Federal land[s]" is defined as "lands the title to which is in the United States after [the date of enactment of this Act]" (16 U.S.C. 3102(2)). Since the OCS is not "situated in Alaska" and does not constitute "lands the title to which is in the United States," it falls outside the statute on either account.

First, the OCS is plainly not, by its very terms, "situated in Alaska." The OCS is "seaward and outside of the area of lands beneath navigable waters" granted to the states by the Submerged Lands Act, 43 U.S.C. 1311, which is that portion of the continental shelf lying within three miles from the state's coast line (see 43 U.S.C. 1312; 43 U.S.C. 1331(a)). Portions of the OCS, including areas involved in Lease Sale 83, are located as far as 350 miles from Alaska's borders. Alaska's seaward boundaries, like those of other coastal states, do not include the OCS because they extend only to those lands conveyed by the Submerged Lands Act (see Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 343).

Second, the OCS is not "federal land" as defined by the Act. ANILCA's definition of "federal lands" reflects the traditional notion that public lands are only those in which the United States holds formal "title." During the last four decades, however, Congress has deliberately and repeatedly declined to equate the federal government's interest in the OCS with formal title. The United States asserts only "sovereign rights [over the OCS] for the purpose of exploring and exploiting its natural resources" (Convention on the Continental Shelf, *done* Apr. 29, 1958, art. 2, para. 1, 15 U.S.T. 471, T.I.A.S. No. 5578, 499

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§ 10, 78 Stat. 985 (defining "public lands" for purposes of public land law review commission study as including OCS mineral resources interests); see also H.R. Rep. 1008, *supra*, at 10.

U.N.T.S. 311);[18] it does not claim "title or ownership in the conventional sense" (*United States* v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Maine*, 420 U.S. 515, 517 (1975); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339-340 (5th Cir. 1978); see generally G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 433-434 (1980) ("The various forms of jurisdiction and sovereignty that the United States has asserted over offshore areas do not amount to a claim of fee ownership of the underlying lands nor to an assumption of complete, exclusive jurisdiction over the waters.")).

Congressional enactments reflect this settled and carefully drawn characterization of the federal interest in the OCS. In the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, Congress carefully distinguished the "title" to the seabed granted to the states from the "jurisdiction and control" over the OCS retained by the federal government. See 43 U.S.C. 1302, 1311(a)(1), 1314(a). In the Outer Continental Shelf Lands Act of 1953, enacted just a few months later, Congress similarly avoided a formal claim of title and instead declared that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition" (Act of Aug. 7, 1953, ch. 345, § 3(a), 67 Stat. 462).[19] More recently, in 1978

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[18] The phrase "sovereign rights," like the phrase "jurisdiction and control" in the Truman Proclamation (see note 19, *infra*), is intended to distinguish the limited rights in the continental shelf from sovereign territorial claims. M. McDougal & W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* 696-699 (1962).

[19] The origins of this characterization of the federal interest in the OCS no doubt lie with the Truman Proclamation of Sept. 28, 1945, in which President Truman declared that the "natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States * * * appertain[] * * * to the United States, subject to its juris-

during its comprehensive overhaul of the 1953 OCS legislation, Congress specifically rejected a finding included in the House-passed bill that would have declared "that OCS lands and resources are public property held in trust" (see H.R. Conf. Rep. 95-1474, 95th Cong., 2d Sess. 75 (1978)) and retained the more limited characterization of the federal interest in the OCS propounded in 1953 (see 43 U.S.C. 1332(1); H.R. Rep. 95-1474, *supra*, at 79). Finally, the Report of the House Committee on Merchant Marine and Fisheries on the 1985 OCSLA amendments (included in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §§ 8001-8005, 100 Stat. 147-151) authoritatively reaffirms this consistent view:

> The term "public lands" enjoys two centuries of well-established meaning as it has been used by the U.S. Congress and interpreted by the Supreme Court. Two fundamental criteria determine whether or not a land area constitutes public lands; the holding of title to the area and the ability to sell or otherwise dispose of it.
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> The U.S. does not hold title to the OCS, nor is the OCS subject to "sale or other disposition under general laws." As opposed to full dominion and control the U.S. has claimed only limited sovereignty over the exploration and development of the natural resources on and within the OCS.

H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985).

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diction and control." Pres. Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 comp.). In considering submerged lands legislation, Congress specifically noted that in its subsequent decision in *United States* v. *California*, 332 U.S. 19, 38-39 (1947), this Court, too, appeared to avoid the use of traditional ownership terminology in describing the federal government's interest in the continental shelf. See *ibid.*; S. Rep. 1592, 80th Cong., 2d Sess. 8 (1948), appended to S. Rep. 133, 83d Cong., 1st Sess. Pt. 1, at 57 (1953); see also *Outer Continental Shelf: Hearings on S. 1901 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 573 (1953) (testimony of Jack B. Tate, Deputy Legal Advisor, Department of State).

In the absence of any clear indication that Congress intended to depart abruptly from its otherwise uniform practice in the context of ANILCA (and we have found none),[20] it should not be assumed that Congress adopted

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[20] The sole reference to the OCS in ANILCA is contained in Section 1001 (16 U.S.C. 3141) which requires that the Secretary undertake a systematic interdisciplinary study of the North Slope of Alaska, including assessment of potential oil and gas development and wildlife resources. Section 1001(a) (16 U.S.C. 3141(a)), in particular, provides that:

> The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve—Alaska, other than lands included in the National Petroleum Reserve—Alaska and in conservation system units established by this Act.

The parenthetical reference to the OCS does not, in our view, suggest that Congress believed that "Federal lands * * * in Alaska" would otherwise have included the OCS. The parenthetical may well have been inserted merely in an abundance of caution to ensure that references to the "North Slope," which in a related statute—the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 *et seq.*—Congress had defined to include the Continental Shelf (see 15 U.S.C. 719b), would not be read so broadly in ANILCA. Notably, the Alaska Natural Gas Transportation Act was under consideration by some of the same congressional committees and enacted at approximately the same time that the early ANILCA legislation was being proposed and drafted. See S. Rep. 95-1300, 95th Cong., 2d Sess. 110-111, 112 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 2, at 31-35 (1978); S. Rep. 94-1020, 95th Cong., 2d Sess. 12-13 (1976). (Note that the Senate Committee on Energy and Natural Resources is the relevant successor to the jurisdiction of the prior Committee on Interior and Insular Affairs.) That Section 1001 does not imply that the OCS is "public" or "federal" lands for the purposes of ANILCA is confirmed, moreover, by reference to Section 1008 (16 U.S.C. 3148). Section 1008(a) requires the Secretary to "establish, pursuant to the Mineral [Lands] Leasing Act of 1920, as amended [30 U.S.C. 181 *et seq.*], an oil and gas leasing program on the Federal lands of Alaska *not subject to the study required by [Section 1001]*" (16 U.S.C. 3148(a) (emphasis added)). Because the Mineral

a different view when it enacted ANILCA. Accordingly, in this respect as well, the definitional provisions of ANILCA exclude the OCS from Section 810's scope.

2. Although where, as in this case, the meaning of the statutory language is plain, that should be "the end of the matter" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), the structure of ANILCA and its legislative history and background further corroborate the plain meaning of these definitional provisions. ANILCA was the third in a series of congressional enactments, commencing with the Alaska Statehood Act in 1958 and ANCSA in 1971, concerned with the allocation of "public lands" in Alaska. See S. Rep. 95-1300, 95th Cong., 2d Sess. 103, 108-109 (1978); H.R. Rep. 95-1045, 95th Cong., 2d Sess. Pt. 1, at 65-77, 189, 192-195, 222-223 (1978); see also H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 153-172 (1979). In neither of those earlier laws, however, could Congress possibly have contemplated that the OCS would fall within the scope of public lands in Alaska. In the Statehood Act, Congress permitted the State of Alaska to select 102,550,000 acres of vacant and unreserved "public lands * * * in Alaska" within 25 years of its admission (Pub. L. No. 85-508, § 6(b), 72 Stat. 340). Similarly, ANCSA provided that Native Alaskans could select up to 40 million acres of certain "public lands" (43 U.S.C. 1611; see 43 U.S.C. 1610(a)), and "public lands" was defined as "all Federal lands * * * located in Alaska" (43 U.S.C. 1602(e)). It is inconceivable that Congress intended to allow either the State of Alaska or Native Alaskans to select portions of the OCS—"a vital national resource reserve held by the [government] for the public" (43 U.S.C. 1332(3)).[21] These provisions shed

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Lands Leasing Act does not apply to the OCS (see note 21, *infra*), Congress plainly did not assume that the term "Federal lands * * * in Alaska" would, absent a parenthetical exclusion, include the OCS.

[21] Notably, ANCSA requires that the Secretary survey and place monuments around any area selected by the Native Alaskans (see

further light on the meaning of "public lands" in ANILCA, the third in the series of related enactments. Cf. *Huddleston* v. *United States*, 415 U.S. 814, 326 (1974).

The structure of ANILCA further suggests that Congress did not intend, *sub silentio*, to expand the meaning of "public lands." For example, Section 810 itself places the duty to perform a subsistence evaluation on "the head of the Federal agency having primary jurisdiction over such lands" (16 U.S.C. 3120(a)). The statutory reference to "primary jurisdiction" was plainly drafted solely with onshore lands in mind. Although there are specific federal agencies with primary jurisdiction over traditional onshore public lands (see, *e.g.*, 30 U.S.C. 352; see also H.R. Rep. 95-1045, *supra*, Pt. 1, at 69), no such "primary jurisdiction" exists generally with respect to the OCS. Instead, agency jurisdiction over the OCS and the waters above turns on the particular activity at issue (*e.g.*, fishing, mineral leasing, navigation, pollution control). See G. Coggins & C. Wilkinson, *Federal Public Land and Resources Law* 434 (1980).

In addition, in enacting ANILCA Congress specifically considered, and rejected, a proposal to require that activities in the area six miles seaward of coastal refuges (which would include portions of the OCS) conform to plans developed to minimize harm to the coastal refuges. See H.R. Rep. 95-1045, *supra*, Pt. 2, at 5-8, 41, 74-76, 81; S. Rep. 95-1300, *supra*, at 149-150. That proposal was

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43 U.S.C. 1612)—a requirement irreconcilable with the proposition that the Natives might select a portion of the OCS. Cf. *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284-285 (1894). In addition, ANCSA provided the Secretary with 90 days to withdraw unreserved "public lands in Alaska" (43 U.S.C. 1616(d)(1)) in order to guard against "a land rush, in massive filings under the Mineral [Lands] Leasing Act [30 U.S.C. 181 *et seq.*]" (H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 45 (1971))—a policy concern irrelevant to the OCS because the Mineral Lands Leasing Act is inapplicable (see 43 U.S.C. 1333(a)(1); *Justheim* v. *McKay*, 229 F.2d 29 (D.C. Cir.), cert. denied, 351 U.S. 933 (1956).

rejected because Congress "was concerned [about] the complexity of jurisdictions [that would result[] from such a designation of [seaward] areas" and concluded that the Secretary could accomplish the basic objectives of the designation under existing statutory authorities (S. Rep. 95-1300, *supra*, at 149-150; see also 124 Cong. Rec. 18025 (1978) (remarks of Sen. Stevens) (opposed to provision because ANILCA "intended to be a land bill."); S. Rep. 95-1300, *supra*, at 359 (Department of Commerce objections)). Identical concerns counsel against the addition of another layer of governmental regulation to OCS activities through Section 810. The OCSLA amendments of 1978, 43 U.S.C. 1331 *et seq.* Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431 *et seq.*, Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*, Fishery Conservation and Management Act, 16 U.S.C. 1801-1802, Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, all apply to activities on the OCS and supply the Secretary with ample authority to consider and protect subsistence resources affected by OCS activities. Indeed, prior to the court of appeals' ruling that Section 810 applied to Lease Sale 57, the Secretary considered the potential adverse impacts on subsistence resources as part of the NEPA planning process (see Sale 57 EIS 47-55, 136-148, 204, 206, 211-213, 223-224, 291-296). Having squarely rejected the coastal wildlife refuge "seaward areas" proposal, Congress can hardly be read as implicitly including in ANILCA an analogous statutory requirement regarding subsistence resources that suffers from the same deficiencies.

Finally, the entire thrust of congressional consideration of ANILCA, reflected throughout the legislative reports, hearings, and the legislative debates, supports the view that the OCS falls outside the scope of ANILCA. As described above, the purpose of ANILCA was to complete the three-step statutory process of achieving "a * * * reso-

lution of the status of [all the] public lands [in Alaska]." H.R. Rep. 95-1045, *supra*, Pt. 1, at 189; S. Rep. 95-1300, 95th Cong., 2d Sess. 103 (1978); see 16 U.S.C. 3101(d). The oft-repeated focus of this legislative effort was the allocation of the 375 million acres of lands and inland water areas within Alaska's formal boundaries (see, *e.g.*, H.R. Rep. 1045, *supra*, Pt. 1, at 65, 69, 192); the OCS's approximately 920 million acres off Alaska [22] (including 203 million acres of sedimentary basins), which were not included in that acreage, were simply not contemplated by anyone to be at issue (see, *e.g.*, 126 Cong. Rec. 18747 (1980) (remarks of Sen. Hart); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer); *id.* at 11129 (remarks of Rep. Udall); H.R. Rep. 96-97, 96th Cong., 1st Sess. Pt. 2, at 97 (1979) ("The State encompasses land and inland water areas of over 375 million acres and tide and offshore submerged lands encompassing some 37 million acres")).[23]

3. Respondents nonetheless argue, and the court of appeals held, that there is ambiguity in whether "public lands" includes the OCS and that, in light of that ambiguity and the rule of statutory construction favoring Indian tribal interests, Section 810 should be liberally construed in favor of the interests of Native Alaskans. As in *Escondido Mutual Water Co.* v. *La Jolla Indians*,

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[22] This estimate has been provided to us by the Department of the Interior.

[23] See also *Alaska National Interest Lands—Part 1: Hearings Before the Subcom. on Fisheries and Wildlife Conservation and the Environment of the House Comm. On Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 119-120, 329 (1979); *Alaska Lands —Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978); *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands, House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 18-19, 30 (1977).

466 U.S. 765, 781 (1984), "[t]his effort to circumvent the plain meaning of the statute by creating an ambiguity where none exists is unpersuasive." None of the purported "ambiguities" suggested by respondents or the court of appeals casts any serious doubt on the conclusion that the OCS falls outside the scope of Section 810.

a. First, respondents argued below, and the court of appeals concluded (Pet. App. 58a-61a), that ambiguity is created because Section 4(b) of ANCSA (43 U.S.C. 1603 (b) (emphasis added)), which extinguishes "[a]ll aboriginal titles, if any, and claims of aboriginal title *in Alaska*," applies to the OCS and there is a "compelling argument that the provisions of [ANILCA] were intended to have the same territorial scope" (Pet. App. 59a). This contention fails, however, because no such "compelling argument" exists. Section 810 of ANILCA and Section 4(b) of ANSCA serve entirely different purposes: Section 4(b) concerns only Alaska Native interests and extinguishes aboriginal claims to all federal, state, and private lands; in contrast, Title VIII of ANILCA concerns all "rural residents" of Alaska (16 U.S.C. 3101(c)) and applies only to "public lands." Even more fundamentally, although the two provisions both use the language "in Alaska," only in Section 4(b) of ANCSA is that language explicitly supplemented by a reference to "submerged land underneath all water areas both inland and offshore" (43 U.S.C. 1603(b)). The absence of similar language in ANILCA reinforces the conclusion that Congress did not intend that Title VIII of ANILCA would apply to the OCS.

The court of appeals (Pet. App. 59a) placed substantial weight on the fact that the Senate version of ANCSA had included a provision that protected subsistence hunting and fishing, which was deleted in conference based on the expectation that "the Secretary and the State [would] take any action necessary to protect the subsistence needs of the natives." H.R. Conf. Rep. 92-746, 92d Cong., 1st Sess. 37 (1971). The legislative history of ANILCA Title VIII, moreover, reveals that

Congress included Title VIII partly because it believed that the federal and state governments had failed to take such necessary protective measures. See S. Rep. 96-413, 96th Cong., 1st Sess. 230-231 (1979); S. Rep. 95-1300, 95th Cong., 2d Sess. 195-196 (1978); H.R. Rep. 95-1045, *supra*, Pt. 1, at 183-184. Finally, the court of appeals noted that Title VIII reflects congressional intent to protect the opportunities for rural residents to maintain a subsistence way of life and that "reliance by coastal villagers upon hunting and fishing in [OCS] waters * * * was well known" (Pet. App. 60a).

The court of appeals' premises do not, however, support its conclusion. To be sure, Title VIII and ANCSA share certain common roots, but that hardly provides a basis for concluding that the geographic scopes of Section 4(b) of ANCSA and Section 810 of ANILCA are coextensive. As described above, their respective statutory purposes and statutory language both plainly suggest otherwise. ANILCA is not a comprehensive law designed generally to protect subsistence resources of importance to rural residents of Alaska. ANILCA is public lands legislation, of which Title VIII is but one part. There is no suggestion that Congress intended that the scope of Title VIII would somehow be broader than that of ANILCA as a whole.[24] ANILCA's definition of "public lands" applies to the entire statute, including Title VIII. Of course, Congress is free to enact broader legislation designed to protect subsistence resources, but neither respondents' desire that Congress do so nor the consideration that such additional legislation might arguably be logically symmetrical to ANCSA's extinguishment of aboriginal rights is a substitute for such an enactment. Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1978) ("[t]he question * * * is not what a

[24] Notably, even the subsistence provision deleted from ANCSA applied (as the court of appeals acknowledged (Pet. App. 59a)) only to "public lands," which in ANCSA, as in ANILCA, does not encompass the OCS (see page 33, *supra*).

court thinks is generally appropriate to the regulatory process, it is what Congress intended").[25]

b. Second, respondents relied below (Pet. App. 58a) on several casual remarks by legislators during the debates to support their view that Congress used the term "in Alaska" in a "general," "[non]technical" sense. None of these isolated remarks, however, was specifically addressed to the question whether the OCS is "in Alaska" and, therefore, none has any direct bearing on that question. Respondents' reliance on these remarks to suggest

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[25] The court of appeals (Pet. App. 60a-61a) cited this Court's decisions in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110-116 (1949), and *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), as supporting a more expansive interpretation of Title VIII's geographical scope. Neither case supports respondents' cause. In *Hynes*, the Court considered a statute that authorized the Secretary of the Interior to designate as an Indian reservation in Alaska "any * * * public lands which are actually occupied by Indians or Eskimos within said Territory." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Secretary relied upon this grant of authority to extend the boundaries of an Indian reservation 3,000 feet from the shore line at mean low tide (337 U.S. at 90 n.1). The fishery thereby included in the reservation was "within [the] Territory" (which extended three miles offshore) and lay over land owned by the United States. Similarly, in *Alaska Fisheries*, at issue was whether a commercial fish trap constructed within 600 feet of the high tide line of an island was within "the body of lands known as Annette Islands," as described in a reservation created by an Act of Congress (248 U.S. at 87). This Court concluded that Congress, by referring to a group of islands "as a single body of lands," had intended the reservation to embrace "the intervening and surrounding waters as well as the upland" (*id.* at 89). The waters and submerged lands in that case were, however, "in the interior of the Alexander Archipelago" (*id.* at 88), "were the property of the United States[,] and [were] within a district where the entire dominion and sovereignty rested in the United States" (*id.* at 87). Unlike the lands and waters involved in these two cases, the OCS lies beyond the nation's three-mile territorial sea, and the United States does not claim title to it. These cases thus do not support construing "in Alaska" in ANILCA to include the OCS, parts of which extend more than 350 miles from the Alaskan coast.

ambiguity in the statutory terms is, accordingly, unpersuasive.

Indeed, when those remarks are considered in their broader context, they reflect the theme, reiterated throughout ANILCA's legislative history and inherently inconsistent with respondents' view, that ANILCA would *not* affect activities on the OCS. Each remark addressed the issue whether certain provisions of the bill would "lock up" areas (*i.e.*, exclude mineral development). For instance, Representative Udall, a key sponsor of the bill, argued that ANILCA would not prevent production of oil and gas on the OCS, which instead would be regulated by comprehensive OCS legislation then recently enacted by Congress:

> Let me tell you what is the result of our bill on Alaska. Most of the oil the experts will tell you is not on land in Alaska. Most of it is offshore. There are 203 million acres of sedimentary basins that have been identified offshore in Alaska.
>
> Let me tell you how much is locked up by this bill. The answer is zero. Under other legislation produced by my friend, the gentleman from New York (Mr. MURPHY) and which we all support, we now have in place good [OCS] legislation. Plans are going forward and all the offshore lands in Alaska where the majority of the oil is to be found are left open by this bill.

125 Cong. Rec. 11128 (1979); see also *id.* at 9900 ("Offshore in Alaska there are 203 million acres of sedimentary basin. Let me tell the Members how much of that is put out of production by this bill so that they cannot get it. The answer is zero.").[26] Comparable state-

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[26] The other statement principally relied on by respondents and the court of appeals (Pet. App. 58a), made by Representative Young of Alaska, who was a major opponent of the legislation, reflects a similar understanding of ANILCA's scope. Representative Young argued that supporting ANILCA was tantamount to "support[ing] offshore drilling in Alaska first over onshore drilling

ments by other legislators reveal a common understanding—consistent with the plain meaning of the statutory language—that ANILCA "has nothing to do with the Outer Continental Shelf" (125 Cong. Rec. 11170 (1979) (remarks of Rep. Emery); see 126 Cong. Rec. 21889 (1980) (remarks of Sen. Bayh) ("100 percent of the offshore sites would remain available to exploration"); *id.* at 21657 (remarks of Sen. Cranston) (same); *id.* at 18747 (remarks of Sen. Hart) ("most of Alaska's undiscovered oil and gas lies offshore, and so would not be affected by these land designations"); 125 Cong. Rec. 11450 (1979) (remarks of Rep. Kostmayer) ("Two hundred and five million acres offshore are untouched by the * * * bill"); see also 16 Weekly Comp. Pres. Doc. 2756 (Dec. 2, 1980) (remarks of President Carter on signing ANILCA into law) ("A hundred percent of the offshore areas * * * [with] potentially productive oil and mineral areas will be available for exploration or for drilling")).[27]

c. Finally, the court of appeals' "most compelling reason" for extending Section 810 to the OCS was that "Title VIII was adopted to benefit the Natives" and that ambiguities in the statute must be resolved in their favor (Pet. App. 62a). The court's (and respondents') reliance on the canon of statutory construction favoring the resolution of ambiguities in statutes in favor of Indians is, however, misplaced. "The canon of construction * * *

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* * * doing a great disservice to the environment" (125 Cong. Rec. 9907 (1979)).

[27] The court of appeals discounted the significance of these expressions of legislative intent on the ground that they "are not inconsistent with the position that Title VIII includes the [OCS] since nothing in Title VIII precludes oil and gas development in the areas to which it applies" (Pet. App. 63a). The common thrust of the statements is not, however, merely that OCS activities would not be "preclude[d]"; they reflect quite unambiguously the view that those activities have "nothing to do with [ANILCA]," "would not be affected," and would be "untouched by the" statute.

tion,"[46] the court of appeals held that the very application of such a balancing test was reversible error.

The Ninth Circuit stated that the plaintiffs did not need to demonstrate the existence of irreparable harm because " '[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action.' " *Gambell II*, 774 F.2d at 1423 (A36). Moreover, any consideration of the harm that would befall others and their competing equities was held to be irrelevant. Instead, the "Ninth Circuit rule" was said to be that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances" where an injunction would interfere with a long-term contractual relationship or where it would do more environmental harm than good. 774 F.2d at 1423 (A38).

A. The Ninth Circuit's *Per Se* Rule Is Directly Contrary to This Court's Holding in *Weinberger* v. *Romero-Barcelo* and to Traditional Equity Principles.

In *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the district court had refused to enjoin the Navy's discharge of ordnance, despite its holding that the Navy was violating the Clean Water Act. The First Circuit mandated an injunction against future discharges, holding that the Clean Water Act required an injunction whenever a violation occurred. 456 U.S. at 310-11.

This Court reversed. It traced the long history of equity in the federal courts and emphasized that an injunction is an extraordinary remedy which requires a showing of irreparable harm, a balancing of the interests of the affected parties, and a regard for the public consequences of the

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[46] Such a finding is necessary when an appellate court reverses a district court's refusal to grant an injunction because it disagrees with fact-finding relevant to the fashioning of a decree. *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982).

order. 456 U.S. at 311-13. While acknowledging that Congress can remove an equity court's discretion, this Court declined so to interpret the Clean Water Act because it did not evidence with sufficient clarity Congress' intention to take such extraordinary action:

> "[T]he comprehensiveness of this equitable discretion is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

456 U.S. at 313, quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See also*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944); *United States* v. *Rodgers*, 461 U.S. 677, 708 (1983); *Mitchell* v. *Robert DeMario Jewelry Inc.*, 361 U.S. 288, 291 (1960).

ANILCA does not limit the scope of equity courts' discretion to grant or to withhold relief regarding violations of Section 810. No provision of ANILCA specifies the remedies to be used for violations of that section.[47] Moreover, Section 810 gives no indication that it must be inflexibly enforced via a *per se* rule.[48] Thus, ANILCA does not constitute a "clear and valid legislative command" to the fed-

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[47] Section 807(a), which deals with violations of Section 804, states that a district court "*may* grant preliminary injunctive relief." 16 U.S.C. § 3117(a) (emphasis added).

[48] *Gambell I* itself recognized that the subsistence interests protected by ANILCA might ultimately yield when they conflict with OCS oil and gas development. 746 F.2d at 582 (A19-20). The Ninth Circuit simply ignored this holding when in *Gambell II* it asserted that "Congress has chosen the protection of subsistence life over oil exploration." 774 F.2d at 1426 n.2 (A43).

eral courts barring the exercise of their normal equitable powers in framing remedies for Section 810 violations.[49]

Rather than analyzing ANILCA from the perspective required by *Weinberger*, the Ninth Circuit simply declared that it had no relevance to this case because *Weinberger* "did not involve the tension between the requirements of [ANILCA] and [OCSLA]," and because it presented only a "narrow question" involving the Clean Water Act. *Gambell II*, 774 F.2d at 1426 n.2 (A42). This attempt to trivialize this Court's holding in *Weinberger* is obviously without merit.

This Court's wide-ranging discussion of equity practice in *Weinberger* shows that it involved more than interpretation of the Clean Water Act. 456 U.S. at 311. Moreover, this Court has on two occasions[50] and the other circuits have on numerous others[51] emphasized that *Weinberger* is

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[49] *Gambell II*'s *per se* rule was based on *TVA* v. *Hill*, 437 U.S. 153 (1978), where this Court held that Congress had limited the district court's discretion to refuse an injunction for a violation of Section 7 of the ESA. 774 F.2d at 1426 (A43). *Hill* has never been cited by this Court for the proposition that every violation of an environmental statute requires an injunction. Indeed, this Court noted in *Hill* that *Hecht* v. *Bowles* had held that, absent a very clear congressional command, a court's equity powers must be broadly construed. *Hill*, 437 U.S. at 193-94.

[50] In *United States* v. *Rodgers*, 461 U.S. at 708, this Court cited *Weinberger* for the proposition that "Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion." In *Park 'n Fly, Inc.* v. *Dollar Park and Fly*, 105 S. Ct. 658, 674 (1984) (dissenting opinion), Justice Stevens cited *Weinberger* for the principle that "injunctions do not issue as a matter of course," even though he dissented in *Weinberger*.

[51] *See, e.g., Greenwood Utilities Commission* v. *Hodel*, 764 F.2d 1459, 1462 (11th Cir. 1985); *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404, 416-17 (1st Cir. 1985); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 581 (7th Cir. 1985); *Sierra Club* v. *Army Corps of Engineers*, 701 F.2d 1011, 1039 (2d Cir. 1983); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1333 (10th Cir. 1982).

to be given broad application. Only the Ninth Circuit has attempted to limit *Weinberger* to cases arising under the Clean Water Act.[52]

By misunderstanding *Weinberger* and erecting a *per se* rule, the Ninth Circuit committed three fundamental errors that are contrary to that decision and to long-enduring principles governing the award of equitable relief. First, the court of appeals abrogated the requirement that plaintiffs must show irreparable harm. This Court has repeatedly held that the basis for the extraordinary remedy of injunctive relief in the federal courts is harm that is irreparable because of the inadequacy of legal remedies. *Weinberger*, 456 U.S. at 312. This requirement may not be ignored merely because a statute has been violated. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-08 (1976); *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974); *Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 506-07 (1959).

Second, the court of appeals' *per se* rule disregards the real irreparable harm that would have been suffered by the defendants if an injunction had issued. In the district court, the intervenor-defendants demonstrated that an injunction would result in the loss of $70 million in prior commitments made for exploration. (JA 25-55). Also, Interior argued and the district court found that an injunc-

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[52]Scholars have consistently given *Weinberger* the broad reading implicit in this Court's opinion. *See*, Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. Pa. L. Rev. 121, 141-46 (1985); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 31 (1984); Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 Minn. L. Rev. 865, 878 (1983). *But cf.* Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524 (1982). However, even Plater's interpretation is broader than the one advanced by the Ninth Circuit, since he agrees that *Weinberger* allows district courts to authorize temporary noncompliance with a statute when, as here, future compliance is likely.

tion would cause irreparable harm to "this nation's quest for new oil resources and energy independence." (A62-63). These are countervailing equities that *Weinberger* and other cases insist be considered prior to the exercise of federal injunctive power. *Weinberger*, 456 U.S. at 312; *Hecht*, 321 U.S. at 329.

Third, the Ninth Circuit rule withdraws from the district courts their traditional discretionary power to balance the equities. The classic exposition of this role was set out by this Court in *Hecht*, 321 U.S. at 329-30:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. . . ."

The essence of equity has been the power of the Chancellor to mold each decree to the necessities of the particular case. Flexibility rather than rigidity is the rule. Thus, the award of an injunction has never been considered a matter of right, even when there is an undoubted violation of a statute or legal right. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). *See also*, *Weinberger*, 456 U.S. at 311; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933); *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352, 359 (1933).[53]

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[53] The need for flexibility is especially great when, as here, the use of equitable powers will have great consequences for the public interest. *Yakus*, 321 U.S. at 440. Thus, this Court has stated that, when the public interest is implicated, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.*, 328 U.S. at 398. *See also*, *Weinberger*, 456 U.S. at 312; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937); *Railroad Commission* v. *Pullman*, 312 U.S. 496, 500 (1941).

B. The Ninth Circuit's *Per Se* Rule Led to an Injunction that Will Not Remedy Past Violations but Will Instead Merely Punish Innocent Parties.

The sole justification for a preliminary injunction is to prevent plaintiff from suffering irreparable harm pending a decision on the merits. *Sampson* v. *Murray*, 415 U.S. at 88; *Brown* v. *Chote*, 411 U.S. 524, 456 (1973). The sole justification for an injunction following a determination of the merits is to remedy the effects of the violation that a plaintiff has proved when there is no adequate redress at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 60; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring). Moreover, as this Court held in *Weinberger*, "the historic injunctive process was designed to deter, not to punish." 456 U.S. at 310 (quoting *Hecht*, 321 U.S. at 329-30).[54] The injunction mandated below violates all of these principles.

Plaintiffs suffered no tangible injury by virtue of Interior's decision to issue Sale Nos. 57 and 83 leases without complying with ANILCA in the manner deemed necessary by the Ninth Circuit. Moreover, the district court found that the conduct of exploration would itself not harm plaintiffs, and the court of appeals did not reverse that finding as an abuse of discretion. The only "harm" that the Ninth Circuit could identify flowing from a violation of ANILCA was the "irreparable damage" that the Ninth Circuit "presume[s] when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 774 F.2d at 1423 (A36).

Even assuming *arguendo* that this type of abstract injury qualifies as "harm" for purposes of fashioning equi-

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[54] *See also, United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952); *Wallace* v. *Cutten*, 298 U.S. 229, 237-37 (1936).

table remedies,[55] it is clear that that harm occurred once and for all at the time the Sale Nos. 57 and 83 leases were issued. The decisions made by Interior to proceed with leasing in the Sale Nos. 57 and 83 areas without compliance with ANILCA cannot be undone by an injunction against exploration. Moreover, even if those decisions must be reconsidered, after full compliance with ANILCA, an injunction against exploration does nothing to facilitate that reconsideration. Thus, an injunction against exploration does nothing to address the "harm" which the Ninth Circuit declared that plaintiffs had suffered.

The only certain consequence of that injunction is that, had it been issued by the district court when it was initially sought by the plaintiffs, it would have imposed losses of at least $70 million upon industry petitioners, even though they were in no way responsible for the Department of the Interior's compliance with ANILCA. (JA 25-55). Punishment *per se* can never justify an injunction; *a fortiori* an injunction that imposes punishment upon innocent parties is invalid.

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[55] In *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983), the First Circuit advanced the theory that, because NEPA is meant to influence the decision-making process, the harm the Act is designed to avoid occurs whenever a decision is made without taking NEPA into account. This notion of abstract "procedural" harm has been questioned by other courts. *See, e.g., Wisconsin* v. *Weinberger*, 745 F.2d 412, 427 (7th Cir. 1984); *United States* v. *162.20 Acres of Land*, 733 F.2d 377, 378 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985). Whatever its merit, this theory can justify an injunction only in circumstances, like *Massachusetts* v. *Watt*, where it is issued before the decision and thus preserves the opportunity of the federal agency to make a decision after compliance with the relevant statute. *Compare, Alaska* v. *Andrus*, 580 F.2d 465, 486 (D.C. Cir.), *vacated in part on other grounds as moot*, 439 U.S. 922 (1978), where the court refused to enjoin ongoing OCS exploration after discovering a leasing-stage NEPA violation which had occurred two years earlier.

CONCLUSION

For all the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

CARL J.D. BAUMAN
HUGHES, THORSNESS, GANTZ, POWELL & BRUNDIN
509 West Third Avenue
Anchorage, Alaska 99501
(907) 274-7527

BRICE M. CLAGETT
E. EDWARD BRUCE*
JOHN T. SMITH II
BOBBY R. BURCHFIELD
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel of Record

Attorneys for Petitioners
AMOCO PRODUCTION COMPANY
ARCO ALASKA, INC.
EXXON CORPORATION
MOBIL EXPLORATION & PRODUCING SERVICES, INC.
SHELL WESTERN E & P INC.
SOHIO ALASKA PETROLEUM COMPANY
TEXACO, INC.
UNION OIL COMPANY OF CALIFORNIA